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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. [redacted] 41

MAGUIRE INDUSTRIES, INCORPORATED,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

EUGENE DANIEL POWERS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 726

MAGUIRE INDUSTRIES, INCORPORATED,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

Petitioner, Maguire Industries, Incorporated, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above cause on November 7, 1949 which sustained the respondent's plea to the jurisdiction of the Court of Claims and dismissed the petition filed by the petitioner therein.

Opinion Below

The opinion of the Court of Claims of the United States was rendered on November 7, 1949. It appears at pages 31-34 of the record.

Jurisdiction

The judgment of the Court of Claims of the United States was made and entered on November 7, 1949. By order of

February 3, 1950, this Court extended the time of the petitioner to file its petition for a writ of certiorari to and including April 4, 1950. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1255.

Questions Presented

After the Under Secretary of War, acting pursuant to the Renegotiation Acts of 1942 and 1943, made a unilateral determination of excessive profits, petitioner timely sought a redetermination of excessive profits *de novo* by the Tax Court of the United States. The Tax Court dismissed the proceeding for lack of jurisdiction and petitioner filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. The petitioner also filed suit in the Court of Claims to recover funds withheld by the United States under an alleged agreement and the unilateral determination. The questions presented by this situation are:

1. Whether the pendency of the proceeding in the Tax Court of the United States, instituted under Section 403(e)(2) of the Renegotiation Act of 1943, and the pendency of a petition to the United States Court of Appeals to review the order of the Tax Court dismissing the petition solely for lack of jurisdiction, constituted a "claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who at the time the cause of action * * * arose, was * * * acting * * * under the authority of the United States" within the provisions of Title 28, United States Code, Section 1500.

2. Whether the Court of Claims of the United States has jurisdiction to hear and determine the cause of action to recover funds alleged to have been improperly withheld and collected by the United States from the petitioner.

Statutes Involved

The applicable statutes involved are set forth in the Appendix, infra.

Statement

On August 7, 1942, petitioner and respondent, acting through the Under Secretary of War, entered into an agreement (R. 5) which provided for the return by petitioner to the United States of America of Six Million ($6,000,000) Dollars together with additional sums to be computed under the agreement, all representing "profits realized or likely to be realized" by petitioner during its fiscal year ending October 31, 1942 (R. 13). Petitioner was further obliged by the agreement to furnish to the Under Secretary of War a written statement with supporting details showing the actual results of its operations from May 1, 1942 to October 31, 1942 (R. 14), and agreed that the Under Secretary of War or his duly authorized representative would have the right in his discretion, within sixty days after the filing by petitioner of the required statement, to "reopen the renegotiation * * * if the result of actual operations from May 31, 1942 to October 31, 1942 were substantially at variance with the estimates for said period * * * but such negotiation shall relate only to such variance, if any * * *." (R. 14-15).

Petitioner complied with the requirement for the filing of a statement of actual operations for the last six months of the fiscal year (R. 2). By letter of May 7, 1943, the Under Secretary of War notified petitioner that a substantial variance existed between the estimated and actual results of operations for the period from May 1, 1942 to October 31, 1942 and that accordingly, he was exercising his right to reopen the renegotiation (R. 3). Negotiations between the parties did not result in a new agreement

(R. 3) and on March 26, 1945 the Under Secretary of War made a unilateral determination that "$750,000.00 of the profits realized by the contractor during the period from May 1, 1942 to October 31, 1942 * * * are excessive" and that this sum "is in addition to the sums otherwise specified to be returned by the contractor * * * and is * * * referred to as 'additional excessive profits'." (R. 9).

Respondent effected collection from petitioner by means available under Section 403(c) of the Renegotiation Act of 1942 and Section 403(c) (2) of the Renegotiation Act of 1943, in the total sum of $8,249,481.13 (R. 1, 2, 3).

Within the time permitted by the Renegotiation Act of 1943, petitioner filed a petition in the Tax Court of the United States under the provisions of Section 403(e) (2) of the Act, seeking a redetermination of excessive profits *de novo* (R. 3). After hearing, the Tax Court of the United States by orders entered January 31, 1949 and March 15, 1949 dismissed the proceeding "for lack of jurisdiction" (R. 3 and 11).

Thereupon, on March 28, 1949, in order to protect claims threatened by the statute of limitations, petitioner filed a petition in the Court of Claims of the United States seeking to recover the sum of $8,249,481.13 (R. 1-5). On March 29, 1949, pursuant to Section 1141(a) of the Internal Revenue Code (26 U.S.C. 1141(a)), petitioner filed in the United States Court of Appeals for the District of Columbia Circuit, a petition to review the order of the Tax Court of the United States dismissing the proceeding there for lack of jurisdiction (R. 30).

On May 9, 1949, respondent filed in the Court of Claims a plea to the jurisdiction of the court and on November 7, 1949, the Court of Claims dismissed the petition there pending, for lack of jurisdiction by virtue of the provisions of

Title 28, United States Code, Section 1500. The Court of Claims held that the proceeding in the Court of Appeals was "a suit against the United States or a person acting under its authority" and accordingly, sustained the plea to the jurisdiction.

Specification of Errors to Be Urged

The Court below erred:

1. In holding that the proceeding in the Tax Court of the United States under the provisions of Section 403(e) (2) of the Renegotiation Act of 1943 for a redetermination of excessive profits *de novo,* was an "essentially judicial" proceeding within the spirit of Title 28, United States Code, Section 1500.

2. In holding that the proceeding upon a petition filed in the United States Court of Appeals for the District of Columbia Circuit for review of the order of the Tax Court of the United States dismissing the proceeding there solely for lack of jurisdiction, is a suit or process against the United States or a person acting under its authority.

3. In holding that the proceeding in the Tax Court of the United States as well as the petition filed in the United States Court of Appeals for the District of Columbia Circuit constituted the allegation of a "cause of action" within the scope of Title 28, United States Code, Section 1500.

4. In dismissing the petition for lack of jurisdiction.

Reasons for Granting the Writ

The Court of Claims of the United States has decided in this case erroneously, it is submitted, two questions of law affecting the jurisdiction of the Court of Claims and of other courts of the United States. The decision of the Court of Claims fails properly to apply governing decisions of this

Court and creates doubt and confusion with respect to an important aspect of the jurisdiction of the Federal judicial system.

In this case, the petitioner and respondent entered into an agreement for the return by petitioner to respondent of a large sum of money representing computed and prospective profits during the petitioner's fiscal year ending October 31, 1942. The agreement granted the Under Secretary of War, acting on behalf of the respondent, the right to "reopen the renegotiation" if he found a substantial variance to exist between the estimates for the period from May 1, 1942 to October 31, 1942 and the actual results of petitioner's operations for that period. In the event of such reopening, the agreement limited the parties to "negotiation" with respect to the variance only.

The Under Secretary of War reopened the renegotiation and when subsequent negotiations failed to result in a new agreement, issued a unilateral determination finding that the petitioner was required to refund additional excessive profits.

In accordance with the administrative process prescribed by the Renegotiation Act of 1943, petitioner filed in the Tax Court of the United States its petition for redetermination of excessive profits *de novo*. The Tax Court of the United States is, of course, an independent agency in the executive branch of the Government of the United States (Title 26, United States Code, Section 1100) and is "an executive or administrative Board" and not a court. *Old Colony Trust Company* v. *Commissioner of Internal Revenue*, (1929) 279 U. S. 716; *West* v. *Commissioner of Internal Revenue*, (CCA 5, 1945) 150 F. 2d 723, cert. den. 326 U. S 795.

The Tax Court in its opinion (R. 12-25) held that it was without jurisdiction to entertain the petition, basically upon

the ground that "the statutory scheme applied to the present circumstances renders this proceeding so inappropriate for a resolution of the true issue as to invoke the gravest doubt of any legislative anticipation that such a dispute could be proper for our consideration" (R. 19). The Tax Court suggested that "there are other fora in which contracts between the United States and private persons may be interpreted and enforced." (R. 24.)

Since the petitioner deemed itself to be a person "aggrieved by a determination * * * as to the existence of excessive profits * * *" (Section 403(e)(2), Renegotiation Act of 1943) and since the Tax Court refused to entertain its petition for redetermination, the only forum within the judicial system of the United States in which the petitioner could properly assert its rights for judicial determination, if the Tax Court was correct, was the Court of Claims of the United States. However, further pursuing the administrative process initiated by the Under Secretary of War in conducting renegotiation proceedings and in taking action under the Renegotiation Acts, petitioner filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the decision of the Tax Court of the United States on the question of its jurisdiction.

The Court below reached the conclusion that proceedings in the Tax Court "are essentially judicial proceedings, and come within the spirit of those proceedings referred to in section 1500 of Title 28 of the United States Code." (R. 33.) The Court below observed that after the action of the Under Secretary of War requiring the petitioner to refund profits, petitioner's "only recourse * * * was by filing a petition with the Tax Court" but held that the petition there filed was "certainly in the nature of a suit

against the United States or against a person acting under the authority of the United States" (R. 33).

As already pointed out and as held by this Court in the Old *Colony Trust Company* case, *supra,* proceedings in the Tax Court of the United States are administrative and not judicial. Furthermore, the proceedings in the Tax Court were not, as the Court below erroneously observed (R. 33), "to recover these funds" which had been withheld or collected by the Under Secretary of War but were rather proceedings to obtain a redetermination of excessive profits in accordance with the administrative procedure prescribed by the Act. No cause of action is asserted in such proceedings. What is invoked is the function of the Tax Court in this regard, as fully defined by the Renegotiation Act, only to determine *de novo* the amount of excessive profits in renegotiation.

The decision of the Court below in this regard is a dangerous enunciation of an erroneous conclusion since it ignores the distinctions established by the Constitution of the United States, by statutes and by decisions of this Court between the executive and judicial branches of the Government and between administrative and judicial proceedings.

The Court below further based its decision upon the conclusion that the proceeding pending in the United States Court of Appeals for the District of Columbia to review the determination of the Tax Court on the question of its jurisdiction "is certainly a suit against the United States or a person acting under its authority", and that a proceeding in the Court of Appeals on appeal from a decision of the Tax Court in tax cases involved "a case or controversy" and "the exercise of judicial power". *Old Colony Trust Company, et al.* v. *Commissioner of Internal Revenue,* (1929) 279 U. S. at 724 (R. 33).

The fact that proceedings on appeal or on a petition for review necessarily invoke an exercise of judicial power is

not determinative of the narrow question whether or not there is present in a particular case a "suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act directly or indirectly under the authority of the United States." Title 28, United States Code, Section 1500.

In *Cohens* v. *Virginia,* (1821) 6 Wheat. 264, and consistently thereafter, this Court has drawn a sharp line of distinction between an appeal and what may constitute a suit or process. This Court there held that where a defendant who had been sued by a State in state court proceedings resorted to the federal judicial process to protect his rights by writ of error, this did not constitute a suit against the State but, instead, a continuation of the proceedings instituted by the State.

The decision of this Court in *Bull* v. *United States,* (1934) 295 U. S. 247, is determinative, it is submitted, of the issues here presented. This Court there held that where proceedings are initiated by the Commissioner of Internal Revenue to collect a tax and the taxpayer, in the presence of summary remedies available to the Commissioner, paid the tax and thereafter instituted proceedings before the Board of Tax Appeals and the Court of Claims of the United States, these proceedings were essentially defensive measures in resisting the power of the United States to effect recovery and in recovering on behalf of the taxpayer what may have been unjustly taken by the United States. This Court stated (295 U. S. at 260):

> "In recognition of the fact that erroneous determinations and assessments will inevitably occur, the statutes, in a spirit of fairness invariably afford the taxpayer an opportunity at some stage to have mistakes rectified. Often an administrative hearing is afforded before the assessment becomes final; or administrative machinery

> is provided whereby an erroneous collection may be refunded; in some instances both administrative relief and redress by an action against the sovereign in one of its courts are permitted methods of restitution of excessive or illegal exaction. Thus, the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense * * *. But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign. If that which the sovereign retains was unjustly taken in violation of its own statute, the withholding is wrongful * * *."

In the *Bull* case, this Court deemed it "immaterial" (295 U. S. at 263) that the taxpayer was required to proceed in the Court of Claims to assert his defense against the summary action of the Commissioner since, in essence, he was entitled to have refunded what may have been unjustly taken. In the instant case, the facts are essentially identical. Under the provisions of the Renegotiation Acts, the remedies of the United States are summary (see Section 403(c) Renegotiation Act of 1942; Section 403(c)(2) Renegotiation Act of 1943). In the instant case, as a matter of fact, about half of the money received by the Government from the petitioner was by way of withholding and the rest was paid by petitioner to respondent under the compulsion of the agreement of August 7, 1942 and of the unilateral determination (R. 1, 2, 3). In *Lichter* v. *United States,* (1948) 334 U. S. 742, this Court held that resort to the administrative procedure, prescribed by Section 403(e)(2) of the Renegotiation Act of 1943, by an aggrieved contractor was not an elective remedy but was the only remedy available to him for the protection of his rights in defense against a unilateral determination under the Act. The defensive measures pursued by petitioner in seeking a final determina-

tion of its excessive profits, if any, for the period in issue are not, therefore, a suit or process within the prohibition of Title 28, United States Code, Section 1500. Compare *Bahen & Wright Inc.* v. *Commissioner*, 176 F. (2d) 538, holding that a proceeding in the Tax Court of the United States is in essence a continuation of proceedings commenced by the Government and is not an independent proceeding by a petitioner.

The Court below failed to apply these controlling decisions and held instead, in substance, that the petitioner is entirely without remedy at this time since it is precluded from proceeding in the Tax Court of the United States by a decision of that Court and in the Court of Claims of the United States by the decision here sought to be reviewed. Certainly, the petition for review submitted to the Court of Appeals for the District of Columbia Circuit does not allege a cause of action and does not constitute a suit or process. Its only purpose in invoking the judicial power of the United States is to have a Court determine whether petitioner is entitled to pursue the administrative process in the Tax Court for redetermination of excessive profits or whether the Tax Court is correct in its decision that petitioner must resort to the only other available forum, the Court of Claims of the United States.

It is submitted that if an effort to seek a review of an order of an administrative body on the sole question of jurisdiction is to be deemed a suit or process against the United States, the entire framework of judicial protection of the rights of citizens is endangered since the Government may well refuse, in the ultimate projection of such a doctrine, to abide such appeal upon the ground that it has not consented to be "sued" in the appellate tribunal. The impact of the decision below on the established procedures for appeal from orders in proceedings in which the United

States may be affected is of extreme seriousness in the field of Federal jurisdiction and requires consideration and determination by this Court.

Conclusion

For the reasons stated, it is respectfully submitted that a writ of certiorari should be granted to review the judgment of the Court of Claims of the United States.

EUGENE DANIEL POWERS,
Attorney for Petitioner.

April, 1950.

APPENDIX

Title 28, United States Code, Section 1500:

> The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Title 26, United States Code, Section 1100:

> The Board of Tax Appeals (hereinafter referred to as the "Board") shall be continued as an independent agency in the Executive Branch of the Government. The Board shall be known as the Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of the Tax Court of the United States.

Title 26, United States Code, Section 1141(a):

> The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code.

Renegotiation Act of 1943 (Act of February 25, 1944, 58 Stat. 21, 78, Revenue Act of 1943) Section 403(e)(2):

> Any contractor or subcontractor (excluding a subcontractor described in subsection (a)(5)(B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act

of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 41

MAGUIRE INDUSTRIES, INC., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 31–34) is reported at 114 C. Cls. 687.

JURISDICTION

The judgment of the Court of Claims was entered on November 7, 1949 (R. 34). By order of the Chief Justice, dated February 3, 1950, the time for filing a petition for a writ of certiorari was extended to and including April 4, 1950 (R. 35). The petition for a writ of certiorari was filed on April 4, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

28 U. S. C. 1500 bars suit in the Court of Claims on "any claim for or in respect to which the plaintiff * * * has pending in any other court any suit or process against the United States" or its agent. The question presented is whether petitioner may sue in the Court of Claims to recover sums paid to and withheld by the Government as renegotiable excessive profits when it has pending in the Court of Appeals, on review from the Tax Court, a proceeding for the redetermination (and recovery) of the same excessive profits.

STATUTE INVOLVED

28 U. S. C. 1500 provides as follows:

> The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

STATEMENT

On August 7, 1942, petitioner entered into a renegotiation agreement with the War Department under the terms of which petitioner was to refund to the Government from its profits for the year ending October 31, 1942, $6,000,000 plus

certain additional portions of its war contract prices (R. 1, 2, 13). The refunds specified by this agreement ultimately amounted to $7,499,481.13, part of which petitioner paid by check and the rest of which was withheld from payments on petitioner's invoices (R. 1–2). In addition to specifying the foregoing refunds, the agreement provided that, if there was a substantial variance between petitioner's estimated figures for May 1 to October 31, 1942, and the actual results of its operations for that period, the Under Secretary of War might "reopen the renegotiation in his discretion, * * * but such negotiation shall relate only to such variance, if any * * *" (R. 2, 14–15).

In April 1943, petitioner submitted to the Under Secretary of War figures showing the actual results of its operations from May 1 through October 31, 1942 (R. 2, 16). On May 7, 1943, the Under Secretary notified petitioner that he had found a substantial variance between the estimates and the actual figures and that he was reopening the renegotiation pursuant to the agreement of August 7, 1942 (R. 3, 16). Then, after almost two years of negotiations had proved unsuccessful, the Under Secretary issued a unilateral determination that $750,000 of the profits realized by petitioner under its renegotiable contracts during the period from May 1 to October 31, 1942, were excessive, these excessive profits being in addition to the sum already refunded in

accordance with the agreement (R. 3, 17). In June 1945, $442,855.83 was withheld from amounts payable on petitioner's invoices, which sum, together with a tax credit of $307,144.17, comprised the refund of $750,000 required by the Under Secretary's determination (R. 3).

Thereafter, petitioner filed in the Tax Court a petition seeking a *de novo* redetermination of its excessive profits for the year ending October 31, 1942 (R. 3, 19). That Court held that, in the peculiar circumstances of this case, it had no authority to make a redetermination either of the excessive profits refunded pursuant to the agreement of August 7, 1942, or of the additional excessive profits recovered as a result of the Under Secretary's unilateral determination. Accordingly, on January 31, 1949, the Tax Court entered an order dismissing for lack of jurisdiction petitioner's proceeding for a *de novo* redetermination (R. 18–25).

On March 29, 1949, following the Tax Court's denial of its motion for rehearing (R. 29), petitioner filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Tax Court's order of dismissal. C. A. D. C. Docket No. 10292.

On March 28, 1949, the day preceding the filing of its petition for review in the Court of Appeals, petitioner instituted the present action (R. 1). In its petition to the Court of Claims petitioner set forth the renegotiation transactions which have

been summarized above and which constituted the basis of the Tax Court proceeding (Compare R. 1–3 with R. 12–18). It prayed judgment against the Government (1) for $7,499,481.13 on the ground that the agreement of August 7, 1942, had been set aside by the Under Secretary of War and (2) for an additional $750,000 on the ground that the Under Secretary's unilateral determination of additional excessive profits was invalid (R. 4, 5). The Government, calling the attention of the Court of Claims to the Tax Court action and to the pendency of the appeal therefrom to the Court of Appeals, filed a plea to the jurisdiction under 28 U. S. C. 1500 (*supra*, p. 2) (R. 30). In a judgment entered on November 7, 1949, the Court of Claims sustained this plea and dismissed the petition (R. 34).

ARGUMENT

The facts alleged and the relief sought in this suit are in substance the same as those involved in petitioner's Tax Court action now pending on review in the Court of Appeals for the District of Columbia Circuit.[1] The plainly expressed purpose of 28 U. S. C. 1500 is to prevent litigation in the Court of Claims of any claim which the

[1] The review proceeding in the Court of Appeals was argued on March 27, 1950, and, as of this writing, has not yet been decided. There is, of course, no dispute in the present suit over the fact that the Court of Appeals action was "pending" within the meaning of 28 U. S. C. 1500 when the decision here in question was rendered.

plaintiff is asserting in some other court against the United States or one of its agents.[2] Viewed in the light of this statutory purpose, the Tax Court is clearly a "court" and petitioner's efforts to obtain a redetermination of its excessive profits clearly constitute a "suit or process." Furthermore, even if it were relevant here, the fact that the Tax Court in other contexts may have been characterized as "an executive or administrative board" rather than a "court" would not help the petitioner. For petitioner has appealed from the Tax Court's order of dismissal to the Court of Appeals for the District of Columbia Circuit which, as held by the court below, is in every technical sense a "court".

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[2] The predecessor of 28 U. S. C. 1500, § 154 of the Judicial Code (c. 231, 36 Stat. 1087, 1138), applied only where another suit was "pending in any other court * * * against any person who, at the time when the cause of action * * * arose, was, in respect thereto, acting * * * under the authority of the United States." In *Matson Navigation Co.* v. *United States*, 284 U. S. 352, this Court, reading § 154 in the light of its legislative history, held that it was designed only "to require an election between a suit in the Court of Claims and one brought in another court against an agent of the Government, in which the judgment would not be *res adjudicata* in the suit pending in the Court of Claims * * *." 284 U. S. at 356. Today, however, 28 U. S. C. 1500 is expressly made applicable where either an agent of the United States or the United States itself is defendant in the pending suit. There is, therefore, no controversy as to its applicability in the instant case if petitioner's proceedings in the Tax Court and the Court of Appeals for the District of Columbia Circuit constitute a "suit or process" in a "court" within the meaning of the statutory language.

We submit, therefore, that the decision below is clearly correct in holding that petitioner's suit for a redetermination of its excessive profits is a jurisdictional bar to the present action under 28 U. S. C. 1500. Moreover, the "narrow question" (Pet. 9) petitioner poses, neither raised in any other pending litigation nor likely to arise in the future, does not warrant review by this Court.

1. Except for an increase in the recovery sought [3] and for slight changes in formulation to accord with the different character of the jurisdiction invoked, there is asserted in this action the same claim pressed in the Tax Court proceeding now pending on review in the Court of Appeals for the District of Columbia Circuit—namely, petitioner's alleged right to recover sums paid to and withheld by the Government as renegotiable excessive profits for petitioner's fiscal year ending October 31, 1942. Cf. *British American Tobacco*

[3] In its Tax Court action, petitioner apparently claimed a refund of $6,000,000 on the ground that the agreement of August 7, 1942, should have been set aside for failure of consideration. Joint Appendix (Record) in C. A. D. C. No. 10292, pp. 5, 25. Here, the asserted failure of consideration is claimed to require a refund of $7,499,481.13 (R. 1, 4). In the Tax Court, petitioner urged that the sum of $442,855.83 (the withholding of which, together with a tax credit of $307,144.17, had satisfied the Under Secretary's determination of $750,000 in additional excessive profits) was illegally withheld from it. Joint Appendix, *supra*, p. 26. Here, petitioner claims the entire $750,000—the tax credit as well as the amount withheld—so that its total prayer is for $8,249,481.13, the sum of $7,499,481.13 plus $750,000 (R. 5).

Co. v. *United States,* 89 C. Cls. 438, certiorari denied, 310 U. S. 627. In the Tax Court, petitioner prayed that the renegotiation agreement of August 7, 1942, should be set aside and a refund made to petitioner. Joint Appendix (Record) in C. A. D. C. No. 10292, p. 25. Here, similarly, petitioner seeks nullification of the agreement and a refund (R. 4). In the Tax Court, petitioner prayed alternatively for refund of the amount withheld pursuant to the Under Secretary's unilateral determination. Joint Appendix, *supra,* p. 26. Here the same relief is sought (see footnote 3, *supra*), this time conjunctively (R. 4). Petitioner's suggestion (Pet. 8) that no recovery of funds was sought in the Tax Court and that no "cause of action is asserted in such proceedings" is a baseless effort to build an argument from the fact that Tax Court jurisdiction in respect of renegotiation matters happens to be framed in terms of "*de novo* redeterminations" and not in terms of "cause of action" and "judgment." See Section 403 (e) (2) of the Renegotiation Act, added by the Revenue Act of 1943, 58 Stat. 21, 87, 50 U. S. C. App. 1191 (e) (2). But petitioner, like every other contractor seeking a Tax Court "redetermination," had as its objective the recovery of money taken from it as excessive profits under the Renegotiation Act. And Congress, recognizing that the remedy it created was designed as an avenue of monetary relief and not as an exercise in abstract mathe-

matical computation, has regularly supplied appropriations for refunds to contractors required by Tax Court redeterminations.[4]

In short, petitioner's pending effort to procure a redetermination by the Tax Court is, in the context of 28 U. S. C. 1500, as much a "suit or process" as the present action in the Court of Claims. Identical in purpose and subject matter, the simultaneous maintenance of these two suits is barred by the plain language of 28 U. S. C. 1500. Cf. *Corona Co.* v. *United States*, 263 U. S. 537;[5] *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 95.

2. As petitioner points out (Pet. 6–8), the Tax Court is not a "constitutional" court and is described in the Internal Revenue Code as "an independent agency in the Executive Branch of the Government." 26 U. S. C. 1100. But whatever significance this point may have for other purposes, it would seem to be wholly irrelevant here.

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[4] First Deficiency Appropriation Act, 1945, Title I, 59 Stat. 77, 90; Third Deficiency Appropriation Act, 1946, Title I, 60 Stat. 600, 622; Supplemental Appropriation Act, 1948, 61 Stat. 610, 623; Treasury Department Appropriation Act, 1949, 62 Stat. 408; Treasury Department Appropriation Act, 1950, Pub. L. No. 150, 81st Cong., 1st Sess. (June 30, 1949).

[5] While stating (Pet. 4) that the instant suit was begun "in order to protect claims threatened by the statute of limitations," petitioner quite properly does not press this consideration, the irrelevancy of which is settled by this Court's decision in *Corona Co.* v. *United States*, *supra*.

From the time of its creation, the Tax Court has functioned, and been viewed by Congress, as a "purely judicial" body (H. Rep. No. 2, 70th Cong., 1st Sess., pp. 30–31), the procedure of which is "judicial, not administrative" (S. Rep. No. 960, 70th Cong., 1st Sess., p. 38), and the decisions of which "are judicial and not legislative or administrative determinations" (H. Rep. No. 1, 69th Cong., 1st Sess., p. 20). See *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 768–769; *Dobson* v. *Commissioner*, 320 U. S. 489, 498–499; *Blair* v. *Osterlein Co.*, 275 U. S. 220, 227; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 121. In tax matters, the Tax Court's decisions, like decisions of the Court of Claims in its field, are final and binding unless reversed on appeal. See 26 U. S. C. 1140; *Old Colony Trust Co.* v. *Comm'r*, 279 U. S. 716, 727. As to its renegotiation jurisdiction, which is involved here, the Tax Court's determinations of the amount of excessive profits are declared by Section 403 (e) (1) of the Renegotiation Act of 1943 (58 Stat. 21, 86, 50 U. S. C. App. 1191 (e) (1)) to be final and not subject to review or redetermination by any court or agency. In short, the mode and consequences of its adjudications demonstrate that the Tax Court is a "court" in fact as well as in name. Cf. *Williams* v. *United* States, 289 U. S. 553, 564–565; Note, 45 Harv. L. Rev. 1221, 1222–23 (1932). And it is this factual

character which is determinative of the problem under consideration here.

28 U. S. C. 1500, barring the Court of Claims to a plaintiff who is prosecuting his claim against the United States or its agent "in any other court," plainly does not intend the word "court" in any technical, constitutional sense. The Court of Claims itself is a "legislative" rather than a "constitutional" court. *Williams* v. *United States, supra.* The statutory reference from the Court of Claims to "any other court" shows that the "other court" referred to need not be a constitutional court. It indicates rather that the word "court" is applicable to any forum which is entitled to share this designation with the Court of Claims. At least in the present case—where petitioner has alleged the same facts, is seeking in effect the same relief, and is afforded equally judicial procedures in both tribunals—the Tax Court fully answers this description.

3. In any event, petitioner's insistence that the "court" described by 28 U. S. C. 1500 must be a court in every technical sense of the word is fully satisfied, as the court below held, by the pendency of petitioner's petition for review in the Court of Appeals for the District of Columbia Circuit. It is settled by this Court's decision in *Old Colony Trust Co.* v. *Comm'r,* 279 U. S. 716, that the courts of appeals, which are constitutional courts, exercise their judicial function in reviewing decisions of the Tax Court. Petitioner makes no

attempt, of course, to dispute the status of the courts of appeals as courts.

At this point, however, petitioner renews in another form (Pet. 9) its argument that the pending proceedings in the Tax Court and the Court of Appeals do not constitute a "suit or process" within the meaning of 28 U. S. C. 1500. While this contention has already been answered above (pp. 7–9), it may be noted here that petitioner's citation of *Cohens* v. *Virginia,* 6 Wheat. 264, adds nothing to its argument. *Cohens* v. *Virginia* held merely that a suit by a state against an individual does not become a suit by the individual against the state when the individual prosecutes an appeal from an adverse judgment. In the Tax Court proceedings involved here, it is petitioner's claim which is being asserted, not that of the United States or its agent. And petitioner's ultimate objective in its petition for review by the Court of Appeals is nothing more or less than its objective when it commenced its Tax Court action—the recovery of the money withheld from it as excessive profits. That entire proceeding, which petitioner has attempted to duplicate in the present suit in the Court of Claims, falls squarely within the language and purpose of 28 U. S. C. 1500.[6] It

[6] Despite petitioner's extensive quotation from *Bull* v. *United States,* 295 U. S. 247 (Pet. 9–10), nothing in that case bears even remotely on the question of what constitutes a "suit or process" within the meaning of 28 U. S. C. 1500.

was, we have submitted, a "suit or process" from its inception in the Tax Court; it continued as such when petitioner brought it to the Court of Appeals.[7]

The description (at 295 U. S. 260) of a taxpayer's proceeding to recover erroneously collected taxes as a kind of "defense" nowhere suggests that such a "defense" may not take the form of a "suit or process." Indeed, the very passage petitioner quotes points out that the "defense" may be asserted in "an action against the sovereign in one of its courts * * *."

Bahen & Wright v. *Commissioner*, 176 F. 2d 538 (C. A. 4), cited at Pet. 11, is equally inapposite. The problem there was whether a dissolved corporation, given three years of continued existence by Delaware law for the institution of "any action, suit, or proceeding," could seek a Tax Court redetermination after expiration of the three-year period when the Commissioner's notice of deficiency was issued one day short of three years from the date of dissolution. The court, pointing out that the "word 'proceeding' is obviously broader than action or suit and should be given full effect in order to achieve the fundamental purpose of the [Delaware] statute" (176 F. 2d at 539), held that the "proceeding" in that case was timely under the Delaware law. If anything, the court's distinction between the word "suit" and the "obviously broader" word "proceeding" lends some weight to description of the Tax Court action as a "suit." Actually, however, the problem in that case was so different from the problem here as to make the language upon which petitioner relies wholly irrelevant.

[7] If the words "suit or process" in 28 U. S. C. 1500 have the meaning "case or controversy," that meaning is satisfied by petitioner's appellate action in the Court of Appeals. *Old Colony Trust Co.* v. *Comm'r*, *supra*. If, however, petitioner is correct in arguing (inconsistently with its arguments directed against the Tax Court as a "court") that the constitutional concepts of the *Old Colony* case are not determinative here (Pet. 8–9), this argument simply illustrates the conclusion we have stressed above—that petitioner's Tax Court proceeding is, in every relevant practical sense, as much a

4. The question in this case is, as petitioner points out (Pet. 9), a narrow one. It is, in addition, a question which appears never to have arisen in the more than six years since the creation of the Tax Court's renegotiation jurisdiction[8] and it is conjectural whether it will arise in the future. On the one hand, the Tax Court remedy afforded by the Renegotiation Act constitutes the "one and only procedure to secure a redetermination" of excessive profits which have been determined by unilateral administrative order. *Lichter* v. *United States*, 334 U. S. 742, 792.[9] On the other hand, the Tax Court has no jurisdiction to redetermine excessive profits which have been refunded to the Government pursuant to an agreement with the contractor.[10] It follows that the

"suit or process" in a "court" as is the present suit in the Court of Claims.

[8] The Revenue Act of 1943, conferring jurisdiction upon the Tax Court to redetermine excessive profits in Section 403 (e) of the amended Renegotiation Act (58 Stat. 21, 86), became law on February 25, 1944.

[9] It may be noted in this connection that, if petitioner is correct in asserting that the Tax Court has jurisdiction of the proceeding instituted there, this constitutes an additional ground for denying Court of Claims jurisdiction over the present suit.

[10] Section 403 (e) (2) of the Renegotiation Act (as amended by the Revenue Act of 1943), the section under which petitioner brought its Tax Court proceeding, gives the Tax Court jurisdiction only over a "determination * * * as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor * * *." Section 403 (e) (1), applying to determinations made by the War Contracts Price Adjustment Board, gives

Tax Court's renegotiation jurisdiction is not to any extent shared by the Court of Claims, while the jurisdiction of the Court of Claims over suits on Government contracts has of course never been conferred upon the Tax Court. Only the special circumstances or legal theories involved in this case may be expected to reproduce similar proceedings—a claim prosecuted both (1) as a petition in the Tax Court for the redetermination of a unilateral order fixing excessive profits and (2) as a contract action in the Court of Claims. We submit, therefore, that the question presented here, in addition to being correctly decided below, does not approach the importance which would warrant review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

PAUL A. SWEENEY,
MARVIN E. FRANKEL,
Attorneys.

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the Tax Court jurisdiction only in cases involving "an order of the Board * * *."

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